



The Honorable Scott Bales, Chief Justice
The Honorable Robert M. Brutinel, Vice Chief Justice
The Honorable John Pelander, Justice
The Honorable Ann A. Scott Timmer, Justice
The Honorable Clint Bolick, Justice
The Honorable John R. Lopez, Justice
The Honorable Andrew Gould, Justice
The Arizona Supreme Court
1501 W. Washington St., Room 402
Phoenix, Arizona 85007

Attn: Clerk of the Supreme Court

**Re: Lambda Legal Letter Supporting Adoption of Model Rule 8.4(g), In the Matter of
Petition R-17-0032: National Lawyers Guild, Central Arizona Chapter, Petition to Amend
ER 8.4, Rule 42, Arizona Rules of the Supreme Court**

Lambda Legal appreciates the opportunity to respond to the Court's Order of January 18, 2018, soliciting public comment on Petition R-17-0032, which proposes to amend Rule 42, ER 8.4, by adopting ABA Model Rule 8.4(g). Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, policy advocacy, and public education. The communities served by Lambda Legal depend on access to fair and impartial courts. More specifically, Lambda Legal established its Fair Courts Project to facilitate the organization's leadership in the fight for fair courts. Additionally, Lambda Legal's Youth in Out-of-Home Care Project advocates for LGBTQ youth who come into contact with the courts through child welfare, juvenile justice and other family and juvenile court proceedings. We offer these comments to express our strong support for the implementation of the proposed amendments.

Fair and impartial courts are a cornerstone of our democracy. Prohibiting discrimination and harassment is essential to ensuring access to the courts and the legal system as a whole for all people. The proposed amendments to Rule 42, ER 8.4 are necessary to safeguard this access.

Discrimination in the Courts

As former American Bar Association (ABA) President Paulette Brown has said, "The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated."¹ Research is clear; LGBT people face

¹ Paulette Brown, *Inclusion Not Exclusion: Understanding Implicit Bias is Key to Ensuring An Inclusive Profession*, ABA J. (Jan. 1, 2016), http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring

discrimination in courts around the country. When Lambda Legal conducted a national survey,² of the more than 1,000 survey respondents who had been in contact with the courts during the preceding five years, nineteen percent (19%) reported hearing a judge, attorney or other court employee make negative comments about a person's sexual orientation, gender identity or gender expression. People of color and transgender people reported higher incidences of negative language: While nineteen percent of respondents overall heard these anti-LGBT comments, 53% of transgender and gender-nonconforming people of color and 66% of transgender women reported experiencing these comments while using the courts. Our survey also solicited information regarding the level of trust respondents had in a range of government institutions. Only 28% of transgender and gender-nonconforming respondents "generally trusted" the courts, which was lower than the 38% percent who indicated trust in the police.³ Additionally, "[a]nonymous surveys conducted by judicial commissions and bar associations to determine the level of bias or prejudice suffered by gay and lesbian court users and employees found that homophobic prejudices continue to permeate courthouses around the country. These studies...universally concluded that the majority of gay and lesbian litigants experienced courthouses as hostile and threatening environments, whether in criminal or civil cases."⁴

In 2017, Lambda Legal assisted a transgender woman with addressing discriminatory treatment she experienced when in a Georgia municipal court regarding a traffic ticket. The prosecuting attorney in the case repeatedly referred to her as "he" and "him" when addressing or speaking about her. Prior to the hearing, he took her aside in a small room with four other people who were not identified to her to discuss the case. He then asked her whether she'd "had the full surgery," an inquiry about genital surgery. This experience was humiliating and dangerous for her. Violence directed at LGBTQ people has seen an increase in recent years. In 2016, among LGBTQ hate-motivated homicide victims, transgender women of color made up the majority of victims in the U.S.⁵ The attorney in this case purposefully disclosed the woman's transgender status to everyone within earshot and refused to acknowledge a core aspect of her identity. The judge presiding over this case did not take steps to address the misgendering and disrespectful treatment. Lambda Legal brought this matter directly to the attention of the judge, who responded with an acknowledgment of her responsibilities and assurances that any future misgendering or other disrespectful treatment directed to transgender people in her courtroom would be promptly and appropriately addressed.

Unfortunately, LGBT people regularly face similar scenarios in courtrooms around the country. Ending this type of mistreatment requires enacting clear nondiscrimination rules, such as those currently proposed.

Experiences of LGBT Youth in Court

² Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), available at www.lambdalegal.org/protected-and-served.

³ *Id.*

⁴ Joey L. Mogul, Andrea J. Ritchie, Kay Whitlock. *Queer (In)Justice: The Criminalization of LGBT People in the United States*, Boston: Beacon Press, 2011, pp. 72, 74.

⁵ National Coalition of Anti-Violence Programs (NCAVP). (2016). *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016*. New York, NY: Emily Waters.

LGBT and questioning youth (“LGBTQ”) are disproportionately involved in child welfare and juvenile justice systems and are disproportionately homeless compared to their non-LGBTQ peers.⁶ In one recent study that surveyed homeless youth in street outreach programs, conducted by the Administration on Children, Youth, and Families, 6.8% of homeless youth surveyed in street outreach programs were transgender, while over 30% identified as something other than heterosexual, with a full 20% of all youth surveyed identifying as bisexual.⁷ Similarly, in a notable study of foster youth, 19.1% of the foster youth surveyed identified as LGBTQ, with 5.9% identifying as transgender, while estimates in the general population indicate that approximately one percent of youth are transgender.⁸ Eleven percent of youth in the same study described themselves as gender-nonconforming.⁹ Family and societal rejection and other negative experiences fuel system involvement, leaving LGBTQ youth particularly vulnerable when discriminated against by courts, lawyers, or judges. This is particularly the case because children in government-funded care depend upon the watchful eye of the court to ensure they have safe places to live and receive services that help them address medical and behavioral health issues, including exposure to past trauma.

In the vast majority of court cases, children are represented by court-appointed attorneys and cannot choose representation by someone they know will be supportive and affirming. LGBTQ youth must rely upon judges and attorneys to treat them respectfully. Lambda Legal has seen firsthand what happens when youth in family and juvenile court settings are represented by attorneys who refuse to acknowledge or respect a youth’s gender identity. Such discrimination is emotional harm that immediately negatively impacts a youth’s well-being and diminishes a youth’s trust in adults who are supposed to advocate and protect them. In addition, as a practical matter, a youth is then forced to navigate around a biased attorney to get needs related to their identity met, such as affirming health care. Elimination of this hurdle allows youth to dedicate their time and emotional energy to school, recommended services or simply engaging in normal, pro-social life activities. Lydia, a former client of Lambda Legal’s in the juvenile justice system in Texas, captured this critical point in a comment about her supportive parole officer, “Once I

⁶ It is estimated that only 5-7 percent of youth are LGBTQ, but they make up almost 25 percent of youth in the foster care system and 20 percent of youth in the juvenile justice system. *See* M. Currey Cook, Christina Wilson Remlin, and Rosalynd Erney, *Safe Havens: Closing the Gap Between Recommended Practices and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (2017), available at: https://www.lambdalegal.org/sites/default/files/tgnc-policy-report_2017_final-web_05-02-17.pdf; True Colors Fund & Nat’l LGBTQ Task Force, *At the Intersections: A Collaborative Report on LGBTQ Youth Homelessness* (2016), available at <http://attheintersections.org/>; Herman, J.L., Flores, A.R., Brown, T.N.T., Wilson, B.D.M., & Conron, K.J. (2017). *Age of Individuals who Identify as Transgender in the United States*. Los Angeles, CA: The Williams Institute, available at <https://williamsinstitute.law.ucla.edu/research/transgender-issues/new-estimates-show-that-150000-youth-ages-13-to-17-identify-as-transgender-in-the-us/>.

⁷ *Data Collection Study Final Report*, Administration on Children, Youth and Families (April 2016), available at https://www.acf.hhs.gov/sites/default/files/fysb/data_collection_study_final_report_street_outreach_program.pdf. *See also* True Colors Fund & Nat’l LGBTQ Task Force, *At the Intersections: A Collaborative Report on LGBTQ Youth Homelessness* (2016), at <http://attheintersections.org/bisexual-youth/>.

⁸ Bianca D.M. Wilson, et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, 6 (2014), https://williamsinstitute.law.ucla.edu/wpcontent/uploads/LAFYS_report_final-aug-2014.pdf; Herman, J.L., Flores, A.R., Brown, T.N.T., Wilson, B.D.M., & Conron, K.J. (2017). *Age of Individuals who Identify as Transgender in the United States*. Los Angeles, CA: The Williams Institute.

⁹ Wilson, et al. at 6.

knew my parole officer was going to respect me and treat me fairly, I was able to focus on what I needed to do and work on positive things.”¹⁰

Prohibiting discrimination based on sexual orientation, gender identity and gender expression will help to ensure that attorneys for children truly represent children’s interests in court, that judges respond appropriately, and that children are protected from further harm by adults in positions of power and authority. Doing so is also consistent with the professional opinion of mainstream social science and child welfare organizations, which have concluded that affirmation of identity in all aspects, such as access to sex-segregated facilities in accordance with identity, freedom to express gender, and respect for names and pronouns, promotes a child’s wellbeing.¹¹

Need for the Amendment

The proposal under consideration asks that ABA Model Rule 8.4(g) be added to the Arizona Rules of Professional Conduct as Rule 8.4 (h). It reads as follows:

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Our courts must be open to all. Discrimination, prejudice, and intolerance threaten the rights and liberties of all Arizonians, including lesbian, gay, bisexual, transgender, nonbinary, gender-nonconforming, and intersex people. They also erode public trust in the fairness and integrity of the courts, undermine confidence in the legal profession, and create barriers to access for those who may need the courts the most. The adoption of these nondiscrimination requirements in the Arizona Rules of Professional Conduct as a formal rule is necessary to make clear to attorneys and to the public the importance of eliminating bias and discrimination in the

¹⁰ See M. Currey Cook, Christina Wilson Remlin, and Rosalynd Erney, *Safe Havens: Closing the Gap Between Recommended Practices and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (2017), available at:

https://www.lambdalegal.org/sites/default/files/tgnc-policy-report_2017_final-web_05-02-17.pdf

¹¹ Child Welfare League of Am., et al., *Recommended Practices to Promote the Safety and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Youth at Risk of or Living with HIV in Child Welfare Settings* (2012), available at

<https://www.lambdalegal.org/sites/default/files/publications/downloads/recommended-practices-youth.pdf>; Brief of Amici Curiae American Academy of Pediatrics, American Psychiatric Association, American College of Physicians and 17 Additional Medical and Mental Health Organizations in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016), vacated and remanded, *Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, No. 16-273, 2017 WL 855755, at *1 (U.S. Mar. 6, 2017), available at <https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-american-academy-pediatrics-et-al>.

legal profession. Refraining from discrimination and harassment should be a specific requirement for all attorneys.

The American Bar Association conducted an extensive two-year investigation and open process for amending Model Rule 8.4(g).¹² The issues that are being raised in opposition to Arizona's current proposed rule were raised, considered, and addressed during the ABA's process.¹³ The scope of the rule, which covers "conduct related to the practice of law" is appropriate and in line with the scope of other states' rules regulating attorney conduct. It is also necessary to ensure that discrimination and harassment throughout the entire legal system can be addressed directly. There is a clear mens rea standard that requires that an attorney "knows or reasonably should know" that they are engaging in harassment or discrimination in order to be in violation of the rule. This rule is unambiguous, fair, and necessary.

The Preamble to Arizona's Rules of Professional Conduct says, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably."¹⁴ The legal profession obligates ethical actions in interactions with clients, opposing counsel, judges, and others. The explicit rule addressing discrimination is completely in line with the other ethical obligations that attorneys must adhere to by virtue of their inclusion in the profession.

Conclusion

Discrimination within the judicial system inflicts highly pernicious injury because the courthouse is "where the law itself unfolds."¹⁵ Formal rules requiring equal treatment will help reduce discrimination and increase public trust in the courts. Lambda Legal strongly supports the proposed amendments to amend Rule 42, ER 8.4. We thank you for considering these comments and for your commitment to ensuring equal treatment within the court system.

Respectfully Submitted,

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¹² American Bar Association, Report to House of Delegates, Revised Resolution on Model Rules of Professional Conduct Rule 8.4, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf

¹³ *Id.* at 6-12.

¹⁴ Arizona Rules of Professional Conduct Preamble ¶ 1.

¹⁵ *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991).